Supreme Court, U.S.
FILED

02 831 NOV 27 2002

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No. 02-

IN THE

Supreme Court of the United States

MARK WILKINSON,

Petitioner,

v.

JONATHAN R. WALLS,
Warden of the Menard Correctional Center, Menard, Illinois,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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64 pp

QUESTIONS PRESENTED

At Wilkinson's state court trial for murdering his wife, his attorney failed to discover that the autopsy establishing a criminal cause of death related a different race and date of death than those of Wilkinson's wife, described the removal for analysis of a gallbladder that she did not have, failed to note obvious scars that she did have, and contained other significant errors. The federal district court denied habeas corpus relief without an evidentiary hearing, or other fact development procedures, to determine whether the autopsy's decedent was Wilkinson's wife or whether the state had proven a criminal cause of her death. Without reviewing the record, the circuit court affirmed the district court's determination that an investigation of the autopsy would not have changed the outcome of Wilkinson's trial.

The questions presented are:

(1) whether *Townsend v. Sain*, in the context of the Antiterrorism and Effective Death Penalty Act and the habeas corpus rules, requires a federal district court to hold an evidentiary hearing regarding the state's failure to prove the corpus delicti of murder, a fact-based claim raising questions of innocence and violation of the Constitution never determined by the state courts; and

(2) whether, without examination of the record below, the circuit court could review de novo the district court's determination of a mixed question of law and fact premised upon an erroneous constitutional standard of law.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The district court's opinion (per Lindberg, D.J.) denying petitioner's habeas corpus petition (Appendix ("Pet. App.") 10a-18a) is an unpublished opinion. The court of appeals' opinion (per curiam) affirming (Pet. App. 1a-9a) is an unpublished order cited as 42 Fed. Appx. 864. The court of appeals' order denying rehearing (Pet. App. 19a-20a) is also an unpublished order.

STATEMENT OF JURISDICTION

The court of appeals entered its order and judgment on July 25, 2002 and denied rehearing on August 16, 2002. Justice Stevens subsequently extended the time to file this petition for a writ of certiorari to and including November 29, 2002. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

The district court's jurisdiction in the original habeas corpus action was based upon 28 U.S.C. §§ 2241 and 2254 and the circuit court's jurisdiction was based upon 28 U.S.C. § 2253.

STATUTORY PROVISIONS INVOLVED

The provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, 28 U.S.C. §§ 2254(d) and (e), relevant to this petition are reprinted in Pet. App. 23a-24a.

STATEMENT OF THE CASE

The Petitioner, Mark Wilkinson, was convicted of murdering his wife, Gilda, when she died after a struggle in their home. On May 26, 1991, an argument began about the settlement of their pending divorce when Mark returned their three-year-old daughter after visitation. Pet. App. 2a.[1] As Mark

1. The additional allegations in this paragraph are from Wilkinson's Amended Petition for Writ of Habeas Corpus (Am. Pet.), 1-3, 6-7, 10.

tried to leave the home, Gilda hit and scratched him several times, then gripped his left wrist with both hands and bit his little finger. Mark bled profusely from the bite, which tore loose muscle in his finger, and subsequent X-rays showed trauma to both sides of the bone in his finger. He was afraid at the time that Gilda was going to chew his finger off. In an attempt to get her to stop biting his finger, Mark first pinched Gilda's nose and then punched her and then tripped her to the floor. Mark finally placed three fingers of his free hand across Gilda's windpipe and squeezed. And he stopped squeezing as soon as she released his finger. Gilda was moving when Mark, in extreme pain, stood and examined his finger. When Gilda didn't get up after a while, Mark looked in her direction and saw that her face was blue and he knew that she was dead. Standing in the marital home with Gilda's body, his divorce experience having taught him that neither the police nor the courts would believe him, Mark decided to dispose of her body. After severing her legs, however, he became sick and could not continue. On August 24, 1992, Wilkinson, represented by counsel, was found guilty of first degree murder and concealment of a homicidal death.

Wilkinson exhausted state court remedies, including his incompetent assistance claim raised in a postconviction petition that was dismissed without a hearing. Am. Pet. 2-6. He then filed a federal habeas corpus petition, subsequently amended, alleging that he was not guilty of first degree murder and setting forth eight grounds to show that he was being held unlawfully. Those grounds included allegations of nine specific instances of ineffective assistance, the willful suppression of evidence by the county medical examiner and the state's failure to disclose that three witnesses who had testified about Wilkinson's desire to kill his wife would be the recipients of beneficial actions by the state's attorney's office. Am. Pet. 7-18. The claim before this Court, however — the only claim that survived the certificate-of-appealability process of two appeals — is that the district court should have held an evidentiary hearing on the

part of Wilkinson's claim of ineffective assistance alleging that trial counsel failed to discover that the county medical examiner who had performed the autopsy and testified at trial had either performed the autopsy on a decedent other than Wilkinson's wife or had otherwise contrived, fabricated or falsified, in whole or significant part, the autopsy and all or part of his trial testimony based upon the autopsy. As factual support for that claim, Wilkinson specifically alleged in his amended petition:

> (a) initially, the date of death and the race of the decedent referred to in Dr. Stein's autopsy (hereinafter referred to as "Stein's decedent") are different than the date of death and the race of Gilda Wilkinson;
>
> (b) additionally, the autopsy showed that Stein's decedent's gallbladder was almost devoid of bile and was removed by Dr. Stein for toxicological examination whereas Gilda's gallbladder had been surgically removed more than 14 months prior to her death on May 26, 1991;
>
> (c) further, while scars are to be noted in an autopsy, Stein's decedent is devoid of scars whereas Gilda had two very noticeable (scars): a scar from the aforesaid gallbladder surgery and another from a C-section used to deliver the daughter of the parties almost three and one-half years prior to Gilda's death;
>
> (d) still further, the autopsy shows that Stein's decedent's uterus, ovaries and tubes were not remarkable and that her vagina showed no evidence of abnormalities which would not be an accurate description of a woman who, like Gilda, had had both a C-section and two abortions. (Am. Pet. 7.)

Subsequently, in an affidavit presented to the district court, Dr. John R. Feegel noted another discrepancy between Gilda Wilkinson and the decedent described in the autopsy: her "teeth were not in poor repair as evidenced by the photograph and report of her dental hygiene." Pet. App. 21a. Dr. Feegel concluded that

> [a]t least these errors or inconsistencies raise the reasonable inference that the Medical Examiner, Robert J. Stein, M.D., performed the autopsy on a decedent other than Gilda Wilkinson or otherwise contrived, or fabricated the autopsy in whole or in part, other than conclusions that are obvious in the post mortem photographs of the outside of the body.

Pet. App. 22a.

Wilkinson argued before both the district and circuit courts that if the autopsy's decedent was not his wife or if the autopsy was fabricated by the medical examiner, then the state did not prove that his wife's death was criminally caused.[2] He supported his argument with medical authority indicating that the circumstances surrounding his wife's death sustained several separate and distinct possible causes of death, at least one of which was innocent rather than criminal. Particularly, the medical authority revealed that there was a slightly more than 50% chance that Gilda Wilkinson died by chewing off a piece of tissue from Mark's finger which contacted her vocal cords or obstructed her larynx, causing cardiac arrest.

The district court reviewed the trial record and denied relief, concluding that Wilkinson had not been prejudiced by his trial counsel's failure to investigate the autopsy because no reasonable jury could conclude that Wilkinson had not intended to kill his wife or that he had acted in self-defense. Pet. App. 13a, 16a-

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2. *See* "Response to Amended Supplemental Answer," 11-14 in the district court and "Brief and Appendix for Petitioner-Appellant," 11-16 in the circuit court.

17a. The court gave great weight to the testimony of several witnesses who told of Wilkinson's desire to kill his wife and to Wilkinson's out-of-court statement that he strangled her. Pet. App. 13a-14a. The court did not take into account that Wilkinson was unable to challenge the veracity of those witnesses prior to the court's final ruling — e.g., at an evidentiary hearing or in his "Response to Amended Supplemental Answer" — because his claim alleging false testimony by those witnesses was no longer before the court, or that Wilkinson was not medically qualified to determine causes of death. In any event, the witness testimony and the out-of-court statement are devoid of probative value regarding the corpus delicti of murder, that is, strangulation as the criminal cause of Gilda's death.

The district court denied relief without a hearing and without discussion of reasons obviating the need for a hearing. The circuit court affirmed, stating that "[t]he district court did not err in deciding that further inquiry through an evidentiary hearing was unnecessary given the facts already before it." Pet. App. 6a. Neither court considered or determined whether the autopsy's subject was Gilda Wilkinson or whether the state proved a criminal cause of her death. Finally, the circuit court denied Wilkinson's petition for rehearing.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

This petition should be granted because the decision below rests upon erroneous standards of law that conflict with holdings of this Court in three important ways. First, the circuit court's decision embodies a Seventh Circuit policy that is in conflict with the strong federal principle, enunciated in *Townsend v. Sain*, 372 U.S. 293 (1963) and *Blackledge v. Allison*, 431 U.S. 63 (1977), favoring evidentiary hearings or, at least, other equally reliable fact-development and fact-resolution procedures in habeas corpus cases. In our recent legal history, almost 700 state prisoners, many convicted of capital murder, have eventually

been proven innocent.[3] Of those innocent prisoners who filed federal habeas corpus petitions prior to their supervening exonerations, virtually all had their petitions denied without the opportunity to prove the facts that ultimately demonstrated their innocence. In view of that record and the aforesaid Seventh Circuit policy, it is appropriate at this time that the Court revisit *Townsend* within the prescriptions of the Antiterrorism and Effective Death Penalty Act (AEDPA) and the habeas corpus rules so it may elaborate the considerations which ought to properly govern the grant of evidentiary hearings in federal habeas corpus proceedings before the repeated denial of relief to innocent state prisoners impairs public confidence in the federal courts. Second, the circuit court both utilized and sanctioned the district court's utilization of a standard of law to determine ineffective assistance of counsel that is in conflict with this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984). Third, the circuit court, in violation of *Strickland* and *Salve Regina College v. Russell*, 499 U.S. 225 (1991), did not review the district court's ineffective assistance ruling de novo. The Petitioner submits that it is important not only to federal habeas petitioners but to the administration of justice that this Court not allow its precedents to be disregarded by the lower federal courts.

Finally, the petition should also be granted because the conflict with the holdings of this Court indicate that the circuit court's decision has so far departed from the accepted and usual course of judicial proceedings, and also sanctioned such a departure by the district court, as to call for the exercise of this Court's supervisory power.

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3. Northwestern University School of Law Center on Wrongful Convictions, *The Exonerated*, (a continuing register, through August 3, 2002).

I. Conflicts With The Holdings Of This Court

(A) The Circuit Court's Decision Conflicts With The Strong Federal Principle Favoring Hearings

This Court has identified a strong federal principle favoring hearings or other equally reliable fact-development and fact-resolution procedures in habeas corpus cases. In *Townsend v. Sain*, 372 U.S. 293, 312 (1963), the Court explained that because detention obtained in violation of fundamental liberties safeguarded against state action by the Federal Constitution

> is intolerable, the opportunity for redress, which presupposes the opportunity to be heard, to argue and present evidence, must never be totally foreclosed. (Citation.) It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues. Thus a narrow view of the hearing power would totally subvert Congress' specific aim in passing the Act of February 5, 1867, of affording state prisoners a forum in the federal trial courts for the determination of claims of detention in violation of the Constitution.

Further, even though the state court record is competent evidence of those contested factual claims, the petitioner still "must be given the opportunity to present other testimonial and documentary evidence relevant to the disputed issues." *Id.* at 322.

The Court of Appeals for the Seventh Circuit, by contrast, has depreciated the hearing requirement by both holding and reasoning. That court, of course, initially lip serves that

> [u]nder *Townsend* and *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), a federal evidentiary hearing is required if a habeas petitioner alleges facts which, if proved, would entitle him to relief and the state courts — for reasons beyond the control of the

> petitioner — never considered the claim in a full and fair hearing.

Porter v. Gramley, 112 F.3d 1308, 1317 (7th Cir. 1997), *reh. den., second reh. pet. den.*, 122 F.3d 351 (1997), *cert. den.*, 522 U.S. 1093 (1998), *reh. den.*, 523 U.S. 1042 (1998). Nonetheless, even petitioners who allege facts which, if proved, would entitle them to relief will almost certainly not receive federal evidentiary hearings in the Seventh Circuit because that court has found that the *Townsend* requirement "cannot be taken literally." *Bracy v. Gramley*, 81 F.3d 684, 693 (7th Cir. 1996), *rev'd on other grounds*, 520 U.S. 899 (1997); *Porter*, 112 F.3d at 1317.

Here, the circuit court upheld the district court's failure to hold a hearing, adopting the state's contention that Wilkinson "failed to present facts that if true would provide him with relief." Pet. App. 4a. The circuit court's only support for that assertion was the district court's finding "that given the overwhelming evidence of his guilt, even without a challenge to the allegedly faulty autopsy report, Wilkinson failed to show that he was prejudiced in any way by trial counsel's decision not to explore the autopsy issue." Pet. App. 5a-6a. The circuit court alluded to the facts that comprised overwhelming evidence of Wilkinson's guilt. First, there was "Wilkinson's own testimony that he killed his wife by strangling her." Pet. App. 6a-7a. The "testimony" was in fact Wilkinson's letter to his parents read into evidence. Pet. App. 13a. More importantly, the state certainly never showed that Wilkinson was qualified to offer an expert opinion about causes of death. Second, the circuit court recited other evidence of guilt: his written plans to kill his wife, his statements to friends that he was going to kill her and his attempt to conceal the crime by hiding her body. Pet. App. 8a. Assuming, arguendo, the accuracy of the circuit court's recitation, the court's characterizations of a record that it did not review,[4] the court is

4. Wilkinson did, indeed, dispute the accuracy of those recitations from the opinion of the Illinois Appellate Court, filtered through the district court to the circuit court, in his "Response to Answer to (Cont'd)

still confusing evidence of intent with evidence of the corpus delicti — and each and every individual recitation of the court does not constitute evidence of the corpus delicti to any degree whatsoever. The "facts" comprising the court's overwhelming evidence of guilt are completely irrelevant to the questions raised in the habeas petition, the questions of whether Gilda Wilkinson was the subject of Dr. Stein's autopsy and, relatedly, whether the state proved the corpus delicti of murder.

The right to a hearing here arises out of the district and circuit courts' fundamental, erroneous and inaccurate assumption that the state proved the corpus delicti of murder.[5] It did not. If Gilda Wilkinson was not the subject of the autopsy then the state did not prove that her death was criminally caused and if her death was not criminally caused then Mark Wilkinson could not be guilty of a crime that, in fact, wasn't a crime. And on the record in this habeas proceeding, it is all but impossible to believe that Gilda was the subject of the autopsy. So whatever Dr. Stein's autopsy may have proved about its subject, it did not prove that Gilda Wilkinson's death was criminally caused. But the state's failure to prove the corpus delicti of murder, the gravamen of Wilkinson's claim, was dismissed by the district and circuit courts, confusing, as they did, intent to kill for a criminal cause of death. On this record the state never proved that Gilda's death was caused by a criminal agency. The district and circuit courts, unperturbed, simply assumed that a crime had been committed. They assumed the very facts — that Gilda Wilkinson was the subject of the autopsy

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(Cont'd)

Petition for Habeas Corpus," Doc. No. 16, pp. 16-20. The so-called murder plan, for example, was a hodgepodge of fantasy and lists involving the minutiae of day-to-day living that neither called for strangulation nor disposal of a body.

5. To prove that a particular death is murder requires the state to first prove beyond a reasonable doubt the corpus delicti of that crime: the fact of death and the fact that the death was caused by the criminal agency of another. *People v. Holmes*, 67 Ill. 2d 236 (1977).

and that her death had been criminally caused — which should have been determined in a full and fair evidentiary hearing.

"More often than not, claims of unconstitutional detention turn upon the resolution of contested issues of fact." *Wingo v. Wedding*, 418 U.S. 461, 468 (1974). Thus, the procedures used to determine the facts of the case are fully as important as the substantive law to be applied. *Id.* at 474. Only the district court here did not hold an evidentiary hearing to determine the primary contested fact: whether Gilda Wilkinson was the subject of the autopsy used to convict her husband.

A federal court has the power to grant habeas relief without holding an evidentiary hearing but rarely does so.[6] It is obvious, then, "that the likelihood of relief in a habeas corpus case is related to the federal court's decision whether or not to conduct an evidentiary hearing."[7] Despite this Court's concern that "the too limited use of (habeas evidentiary) hearings would allow many grave constitutional errors to go forever uncorrected," *Townsend*, 372 U.S. at 319, evidentiary hearings are held in only one-fifth of one percent of all federal habeas cases.[8]

That number of federal habeas hearings, one-fifth of one percent, is indeed too limited when juxtaposed against the number of petitioners who are innocent of the crimes for which they were convicted. In an examination of every capital conviction in the United States between 1973 and 1995, Columbia School of Law Professor James S. Liebman found that 7% of all capital convictions nationwide were reversed because the condemned persons were found to be innocent of

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6. Randy Hertz and James S. Liebman, *Federal Habeas Corpus Practice and Procedure*, 4th ed. (Matthew Bender and Co., Inc., 2001), pp. 799-800.

7. *Id.* at 800.

8. *Judicial Business of the United States Courts: 2001 Annual Report of the Director Leonidas Ralph Mecham*, by the Statistics Division of the Administrative Office of the United States Courts (Washington, D.C.), Table C-4 (p. 154).

the crimes for which they had been convicted.[9] In Illinois the rate of reversal due to innocence is significantly higher than the national average — due, perhaps, to a program at Northwestern University that enables students to investigate questionable convictions — and that higher exoneration rate in Illinois may well mean that the rate of conviction of innocent people in capital cases nationwide could be substantially higher than the 7% actually documented by Liebman.[10] Further, Liebman's findings extend to non-capital cases because the same factors that contribute to the convictions of innocent persons in capital cases — faulty evidence, unscrupulous prosecutorial tactics and incompetent defense attorneys — also adversely affect non-capital cases.[11]

The aforesaid juxtaposition, then, of Liebman's innocence percentage and the infrequency of evidentiary hearings signals the following extrapolation to the 24,684 currently pending federal habeas petitions.[12] Of those petitioners, 1,728 are innocent of the crimes for which they were convicted but only 3 or 4 petitioners, one in 500, will be granted evidentiary hearings. Even if we might disingenuously assure ourselves that all of the hearings granted to the 24,684 current petitioners will be granted to innocent prisoners, still only 49 of the 1,728 innocents, less than 3%, would be given the opportunity to prove their innocence. It is, then, of paramount importance to the current 24,684 federal habeas petitioners and to all future

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9. Hans Sherrer, "Landmark Study Shows the Unreliability of Capital Trial Verdicts," *Justice Denied*, Vol. 2, Issue 2, November 2000.

10. *Id.*

11. *Id.*; and "Nothing Short of Justice," *Chicago Tribune: Editorials*, April 16, 2002.

12. *Judicial Business of the United States Courts: 2001 Annual Report of the Director Leonidas Ralph Mecham*, by the Statistics Division of the Administrative Office of the United States Courts (Washington, D.C.), Table C-2 (p. 131); the 24,684 pending petitions do not include 8,644 pending petitions to vacate sentences.

petitioners that this Court not allow its precedents respecting habeas corpus hearings to be interpreted into irrelevance and disregarded as the Seventh Circuit has done in recent years.

Federal habeas hearings are doubly important because they are almost always a state prisoner's final opportunity to safeguard his constitutional rights and to vindicate his innocence. Certainly, the protection of constitutional rights is important but the vindication of innocence should be more important. After all, constitutional rights in criminal proceedings exist for the express purpose of assuring that innocent persons are not convicted of crimes. *Herrera v. Collins*, 506 U.S. 390, 398-99 (1993). Innocence has always been a primary focus of criminal proceedings in the United States. So said the Chief Justice in Herrera, at 398: "[T]he central purpose of any system of criminal justice is to convict the guilty and free the innocent." In recent years, this Court has found that innocence matters in habeas corpus proceedings as well. *See, e.g., Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986); *Herrera*; and *Schlup v. Delo*, 513 U.S. 298, 324-25 (1995). Justice Powell, writing for the plurality in *Kuhlmann*, explained:

> Even where, as here, the many judges who have reviewed the prisoner's claims in several proceedings provided by the State and on his first petition for federal habeas corpus have determined that his trial was free from constitutional error, a prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated.

477 U.S. at 452. The concern about the injustice that results from the conviction of an innocent person is reflected in the "'fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.'" *Schlup*, at 325 *quoting In re Winship*, 397 U.S. 358, 372 (1970).

But what does innocence actually matter in a federal habeas proceeding if a petitioner presenting facially adequate fact-based claims — claims which, if proved, would entitle the petitioner to relief, claims that raise the issue of innocence and are neither patently false nor palpably incredible, claims that were presented to but not determined by the state courts — will never be granted a hearing to prove those claims? And this Petitioner's ineffective assistance of counsel claim both raises the issue of his innocence of the murder of his wife and would entitle him to relief if proved. Nonetheless, the district court denied Wilkinson's habeas petition without resolving the disputed facts that underlay the claim and the circuit court affirmed. And the circuit court's decision in the instant case is not in any way anomalous. It is, rather, part of a line of Seventh Circuit decisions standing for the proposition, contra to *Kuhlmann, et al.*, that innocence is irrelevant in habeas proceedings. If, then, the Seventh Circuit has chosen not to faithfully follow the holding in *Townsend* because the requirement of a hearing "cannot be taken literally," *Bracy*, 81 F.3d at 693; *Porter*, 112 F.3d at 1317, it has certainly chosen to follow the dictum in *Townsend*, 372 U.S. at 317, implying that innocence is not a ground for federal habeas relief. *Milone v. Camp*, 22 F.3d 693 (7th Cir. 1994).

Mendiola v. Schomig, 224 F.3d 589 (7th Cir. 2000) and *Porter* are emblematic of the Seventh Circuit's policy. Julio Mendiola was convicted of the murder of a rival gang member based upon the testimony of two witnesses to the crime. One of the witnesses, Maria Balderrama, did not identify Mendiola as the man who shot the victim but corroborated certain details of the testimony of the other witness, a member of the same gang as the victim, who did identify Mendiola. Mendiola subsequently moved for a new trial, supporting his motion with a transcript of Balderrama's out-of-court statement to Mendiola's lawyer that while on the witness stand and able to observe Mendiola she came to realize that he was not the shooter and, further, that, after completing her testimony, she expressed that realization to one of the prosecutors who asked her not to tell

Mendiola's lawyer. Without holding an evidentiary hearing, the judge decided that Balderrama was lying about telling the prosecutor of her belief that Mendiola was not the shooter. The appellate court affirmed, finding Balderrama's post-trial statement regarding the conduct of the assistant state's attorney both incredible and immaterial.

The District Court for the Northern District of Illinois, denying Mendiola's habeas corpus petition, also without a hearing, upheld as reasonable the state appellate court's decision. This Court has indicated that a conviction should be reversed where one of two eyewitnesses to a crime informed the prosecutor that the defendant was not the perpetrator and that evidence was not disclosed to the defense, *United States v. Agurs*, 427 U.S. 97, 112 n.21, and that credibility assessments require evidentiary hearings, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Cabana v. Bullock*, 474 U.S. 376, 388 n.5 (1986). Nonetheless, the Seventh Circuit affirmed the district court, holding that the new 28 U.S.C. § 2254(e)(1), part of the AEDPA, does not require state court factual findings — apparently even findings assessing credibility — to be based on evidentiary hearings. The circuit court, then, found that disbelief of all recantations, disbelief as a matter of a policy allowing courts to dismiss recantors as liars without ever hearing their testimony, was sensible and reasonable. The court was apparently undisturbed by the self-evident fact that if the recantation were true, then Mendiola was almost certainly innocent of the crime for which he was convicted.

Perhaps Illinois's most infamous case involving the denial of a federal habeas hearing to a state prisoner proven innocent is the case of Anthony Porter.[13] In September 1998, Porter was 50 hours from execution. He had exhausted his appeals, including the denial of certiorari by this Court, and his family

13. Unless otherwise noted, all facts regarding the Porter case are from the Northwestern University School of Law Center on Wrongful Convictions, *The Illinois Exonerated: Anthony Porter* (revised 5-12-02).

had made his funeral arrangements. At that point, the Illinois Supreme Court granted a stay of execution after several volunteer lawyers filed a last-minute petition arguing that Porter's mental capacity rendered him incapable of understanding his punishment. Before the state trial court could hold a competency hearing, students at Northwestern, their professor and a private investigator working with them produced a recantation statement by the surviving eyewitness who had identified Porter as the man who had killed the two victims, saying that the police had pressured him into naming Porter. Next Inez Jackson, the estranged wife of Alstory Simon, told the Northwestern team that she had been present when Simon shot and killed the two victims and that Porter had nothing to do with the crime. A few days later, Simon made a videotaped confession to the investigator and Porter was released from prison as an innocent man.

Prior to Porter's exoneration in 1999, he had filed a federal habeas corpus petition, alleging, inter alia, innocence, ineffective assistance of counsel and jury taint. *Porter v. Warden*, 1996 WL 167340 (N.D. Ill. April 4, 1996). Porter's ineffective assistance claim was premised, in part, on counsel's failure to present evidence at trial that Alstory Simon or Inez Johnson (a.k.a. Jackson) murdered the victims. In support of his claim of innocence, Porter filed affidavits which the district court characterized as inferring that either Simon or Johnson committed the double homicide. *Id.* at *3. The district court found that an evidentiary hearing to expand the record beyond the affidavits was unnecessary and the circuit court affirmed and thereafter denied two rehearing petitions. *See Porter v. Gramley*, 112 F.3d 1308 (7th Cir. 1997), *reh. den.*, *second reh. pet. den.*, 122 F.3d 351 (1997), *cert. den.*, 522 U.S. 1093 (1998), *reh. den.*, 523 U.S. 1042 (1998). The circuit court ruled that Porter had not presented facts that, if proved, would have entitled him to relief, finding that Porter's affidavits were "overwhelmed" by the eyewitness trial testimony. 112 F.3d at 1313, 1314. There was no physical evidence connecting Porter

to the murders so the state's case relied solely on the eyewitness testimony.[14] The two eyewitnesses claimed to have seen Porter, a black defendant, from the distance of almost 100 yards at night in a dark Chicago park. On that testimony, Porter was convicted and sentenced to death and it was that testimony that the federal circuit court found "overwhelmed" any evidence that Porter could have presented had he been granted a hearing.

"The problem of the power and duty of federal judges, on habeas corpus, to hold evidentiary hearings — that is, to try issues of fact anew — is a recurring one." *Townsend*, 372 U.S. at 309. *See, e.g., Brown v. Allen*, 344 U.S. 443 (1953); *Blackledge, supra*, (1977); *Ford v. Wainwright*, 477 U.S. 399 (1986); and *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). Since this Court's decision in *Townsend* in 1963, Congress has adopted Habeas Corpus Rules 6, 7 and 8 (1976) governing evidentiary hearings and record expansion and passed the AEDPA (1996). That combination raises an important question of federal statutory, precedential and procedural construction not yet settled by this Court, namely the proper interaction of *Townsend*, the AEDPA and the habeas rules.[15]

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14. Grace Elting Castle, "Freeing Anthony Porter," *Focus International*, Vol. 5, No. 1, Fall 1999.

15. Although the Seventh Circuit has held that habeas rule 7 expansion of the record "was designed specifically to avoid evidentiary hearings," *Simmons v. Gramley*, 915 F.2d 1128, 1139 (7th Cir. 1990), neither the district nor circuit court invoked or relied upon the habeas rules to deny Wilkinson a hearing. Reliance upon the habeas rules, in any event, would have been misplaced. *Blackledge* noted that a district judge may utilize Rules 6 and 7 "in an effort to avoid the need for an evidentiary hearing." 431 U.S. at 81-82. *Blackledge*, however, never held that a judge might refuse a hearing without utilizing the rules: "before dismissing facially adequate allegations short of an evidentiary hearing, ordinarily a district judge should seek as a minimum to obtain affidavits from all persons likely to have firsthand knowledge." 431 U.S. at 82 n.25. Additionally, the Advisory Committee Notes to Rule 7 indicate that the rule was not intended to avoid most evidentiary hearings. (Cont'd)

The absence of a pronouncement from this Court, particularly in view of the dearth of evidentiary hearings nationwide,[16] creates grave and continuing consequences not only for all innocent habeas petitioners but for the rest of us as well. That is true because, as this Court stated in *Townsend*, 372 U.S. at 311, federal habeas corpus is a proper procedure to safeguard the constitutional rights of all persons within the jurisdiction of the United States. And as the Great Writ is emasculated by the paucity of hearings as the vehicle to prove innocence, the number of incarcerated innocents, already large, will continue to grow, almost certainly impacting the public's confidence in the courts that allow innocent people to be executed or languish in prison for, in many cases, their entire lives. David A. Brock, in a speech at the 1998 William H. Rehnquist Award Dinner, referred to a Gallup Poll "in which only 15 percent of respondents believed the courts were meeting society's needs or would in the future."[17] Indeed, even the Governor of Illinois has lost confidence in the ability of his state's courts to separate the innocent from the guilty. Since 1977, when the Illinois death penalty statute went into effect, twelve men have been executed while thirteen others have been released from death row as innocent.[18] After the thirteenth man

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(Cont'd)

It was, rather, to be used in those cases where "hearings were necessitated by slight omissions in the state record which might have been cured by the use of an expanded record." By far the majority of cases surviving early dismissal, the Notes state, still "require an evidentiary hearing."

16. The grant of hearings in only one-fifth of one percent of habeas cases nationwide indicates that the Seventh Circuit's aversion to hearings is shared by most, if not all, of the other circuits.

17. National Center for State Courts, *How the Public Views the State Courts: a 1999 National Survey*, p. 4.

18. John O'Connor, "Death Penalty Reform Faces Uncertain Future in Illinois," *Chicago Daily Law Bulletin*, April 27, 2002; "Illinois to Review Death Penalty Clemency Requests," *Associated Press*, September 4, 2002.

was released, Governor George Ryan declared a moratorium on executions in Illinois and is currently reviewing commutation petitions for all 157 death row inmates.

In the instant cause, the district court denied Wilkinson's petition without a hearing, holding that as long as the state trial record contained evidence of intent and lack of self-defense, it did not matter that his ineffective assistance claim raised constitutional doubt that the death in question had been criminally caused. The circuit court acknowledged "the lack of a factual record in the state court with respect to the autopsy report," Pet. App. 4a, but then ignored both the factual and legal impact of the autopsy's failure to prove the corpus delicti of murder. The court apparently believed that as long as the district court found overwhelming trial evidence of guilt, Pet. App. 5a, 7a, it need not consider whether other evidence, evidence not presented at trial due to trial counsel's ineffective assistance, showed that the death in question was not a crime.

(1) An Evidentiary Hearing Was Required To Determine Whether Gilda Wilkinson Was The Subject Of The Autopsy

The circuit court affirmed the district court's denial of Wilkinson's habeas petition without a hearing because "Wilkinson failed to present facts that if true would provide him with relief." Pet. App. 4a. The circuit court found that Wilkinson could not show prejudice, the second prong of the *Strickland* test to determine ineffective assistance, due to the overwhelming evidence of his guilt. In fact, the evidence of guilt, measured against Wilkinson's allegations concerning the autopsy, is hardly overwhelming. Further, Wilkinson suffered extreme prejudice when his attorney's failure to investigate an autopsy indicating in its opening lines that the decedent was not Wilkinson's wife resulted in Wilkinson's murder conviction for a death that was as likely as not accidental. The autopsy, then, is the key to the habeas action because if the autopsy's decedent was not Wilkinson's wife or if the autopsy's

conclusions were otherwise fabricated, then Wilkinson most assuredly alleged facts that, if proved, entitled him to relief.

The facts alleged in support of Wilkinson's ineffective assistance of counsel claim create the all but conclusive presumption that the subject of the autopsy used to convict Wilkinson of murdering his wife was not, in fact, his wife. The autopsy, at the top of its first page, related a different date of death and a different race than those of Wilkinson's wife. The autopsy went on to describe the removal, for laboratory analysis, of a gallbladder that Wilkinson's wife did not have and it failed to note obvious scars that she did have from her gallbladder surgery and from a C-section used to deliver the daughter of the parties. The autopsy additionally contained, as Dr. John R. Feegel stated in his affidavit or as Wilkinson himself noted in his habeas petition, descriptions of teeth and internal organs inconsistent with the real Gilda Wilkinson. In Dr. Feegel's expert opinion, these errors and inconsistencies in the autopsy raised, at a minimum, "the reasonable inference that the Medical Examiner, Robert J. Stein, M.D., performed the autopsy on a decedent other than Gilda Wilkinson or otherwise contrived, or fabricated the autopsy in whole or in part, other than conclusions that are obvious in the post mortem photographs of the outside of the body." Pet. App. 22a.

If the autopsy and Dr. Stein's testimony based upon it are removed from the case against Wilkinson — as they must be if the autopsy was either fabricated or of a decedent other than Wilkinson's wife — then there was and is insufficient evidence that his wife's death had a criminal cause. That is true because, under the facts brought out at Wilkinson's state court trial, Gilda Wilkinson may well have caused her own death. One may, of course, reasonably ask how that's possible. After all, wasn't Mark choking Gilda when she died? Choking her with three fingers of his free hand only because all other attempts to get her to stop chewing on a finger of his other hand had failed, but choking her nonetheless? And didn't Mark himself assume that he had caused Gilda's death? App. 13a. Isn't it obvious, then,

that Mark killed Gilda? Only the obvious is often not true. Due to his failure to investigate the autopsy, Wilkinson's trial counsel also failed to investigate alternative causes of death inherent in the facts, an investigation that should have led counsel to realize that Gilda's death as likely resulted from her chewing as from Mark's choking.

Cyril Polson, et al., in *The Essentials of Forensic Medicine*, 4th ed. (Oxford: Pergamon Press, 1985), 351, 355, a well-recognized treatise used by many pathologists, state that slightly more than half of deaths that appear to be caused by the obstruction or constriction of the airway are actually the result of cardiac arrest caused by foreign matter making contact with the vocal cords or obstructing the larynx. And the foreign matter triggering cardiac arrest may be very small: a tiny down feather, a fingernail clipping and minute food particles have all caused such deaths. *Id.* at 351, 355, 466-67. In other words, Gilda would have caused her own death if, gnawing on Mark's finger, she tore loose a fragment of his tissue — a small clipping of skin, muscle or tendon or a chip of bone — which then induced cardiac arrest by contacting her vocal cords or obstructing her larynx.

(2) The District Court, Based on Trial Evidence Infected by the Ineffective Assistance of Counsel, Denied Wilkinson's Claim of Ineffective Assistance

What, then, was the cause of Gilda Wilkinson's death? Did she die of strangulation, as alleged by the state? Or did she die of cardiac arrest induced by her own attempt to chew off one of Mark's fingers, the cause of death not presented to either court or jury due to Wilkinson's attorney's failure to investigate an autopsy that should have aroused suspicion with its opening lines? Certainly, no court, state or federal, ever determined how Gilda Wilkinson died[19] or whether the state proved a criminal

19. The jury, by its general verdict, in effect said that it was satisfied from the evidence — evidence, unbeknownst to the jury, infected by the ineffective assistance of Wilkinson's counsel — that Mark killed Gilda but the jury did not make any finding as to the cause of death.

cause of her death by evidence other than the autopsy. But then, no court, state or federal, ever determined whether Gilda was even the subject of the autopsy used to convict Mark. Absent a competent autopsy unquestionably performed upon Gilda we simply cannot tell how she died because the facts brought out at trial coupled with competent medical authority leave either cause of death as likely as the other. Absent a competent autopsy, then, we cannot tell with more than coin-toss certainty whether Wilkinson is factually innocent of his wife's murder but that very uncertainty, that 50% uncertainty, under *Schlup, supra*, and Illinois authority, demonstrate that Wilkinson is at least legally innocent of her murder.

In Illinois, it has long been a maxim of the law that "where an act may be attributed to a criminal or to an innocent cause, it will be attributed to the innocent cause, rather than to the criminal one. A crime is never presumed where the conditions may be explained upon an innocent hypothesis." *People v. Ahrling*, 279 Ill. 70, 81 (1917). Further, where no autopsy had been performed upon the victim in a murder case, medical testimony about the manner and cause of death was unsatisfactory. *People v. Brown*, 57 Ill. App. 3d 528 (1st Dist. 1978). In *People v. Wilson*, 400 Ill. 461, 473 (1948), the Illinois Supreme Court reversed the defendant's conviction when a defense doctor threw "some doubt upon the accuracy of the autopsy."

Due, however, to the ineffective assistance of Wilkinson's trial counsel, neither the state trial court nor jury ever heard about the "innocent hypothesis" that "may [have] explained" Gilda Wilkinson's death. Nor did court or jury ever hear any evidence so much as suggesting that Wilkinson or his attorney entertained any doubt about the identity of the autopsy's decedent or that they believed the autopsy in any way left the relationship between a criminal agency and the cause of death unproved.

The proposition is firmly established in our legal system "that proof beyond a reasonable doubt marks the legal boundary between guilt and innocence." *Schlup* at 328, *citing Winship*. Indeed, the existence of every fact necessary to constitute the crime charged must be proved beyond a reasonable doubt because "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *Winship* at 363-64. In the instant cause, absent the autopsy and the medical examiner's testimony based upon it, Wilkinson was not proven guilty beyond a reasonable doubt because, absent the autopsy and the concomitant testimony, the state did not and could not prove that Gilda Wilkinson died of strangulation. Indeed, absent the autopsy, the only evidence of strangulation as the criminal cause of death establishing the corpus delicti of murder is Wilkinson's statement, cited by the district court, that he strangled his wife. Pet. App. 13a. Wilkinson, a layman, not a pathologist, was, of course, unqualified to state a cause of death when at least two distinct causes of death were inherent in the facts surrounding his wife's death. And while his statement might be used to connect him to any crime that may have occurred, it cannot be used to prove the corpus delicti of a purported crime because "[t]he fact that a crime was committed . . . must be proven by evidence outside the confession of the defendant." *Isaacs v. United States*, 159 U.S. 487, 490 (1895).

Absent the autopsy, then, the state did not and could not prove that Gilda did not die of cardiac arrest caused by her own attempt to chew off one of Mark's fingers. And cardiac arrest under that circumstance would be, per *Ahrling*, an innocent cause of death — innocent, that is, as far as Wilkinson was concerned; his wife, after all, was committing aggravated battery upon him. *See* Pet. App. 17a. And if the state could not prove that Gilda's death was criminally caused, then Mark is legally innocent of murder.

Those, then, are the facts which, if proved, entitle Wilkinson to relief. Only neither the district court nor the circuit court here ever gave Wilkinson the chance to prove those facts just as those courts never gave Mendiola or Porter the chance to prove facts that would have exonerated them. Whether Gilda Wilkinson was the subject of the autopsy used to convict Mark is a question of fact, a very significant question of fact because, in conjunction with the trial facts, it raises the question of the cause of Gilda's death. Whether Gilda died of strangulation or of cardiac arrest is also a question of fact and it is a question of fact that goes not only to the issue of whether Mark is guilty of murder but to the more primary issue of whether a crime had been committed at all. If Gilda's death was not a crime, or, at least, if the state did not prove beyond a reasonable doubt that her death was criminally caused, then Mark Wilkinson is certainly entitled to habeas corpus relief. Minimally, Wilkinson is entitled to a hearing to determine whether the autopsy's decedent was his wife and whether, whomever the autopsy's decedent may have been, his wife's death was criminally or innocently caused.

Only the district court here decided, without an evidentiary hearing or expansion of the record, that there was sufficient trial evidence of Wilkinson's intent to kill his wife and of the lack of self-defense so that Wilkinson could not show that "the result of the trial would have been different" had his attorney attacked the validity of the autopsy. Pet. App. 4a, 13a, 16a-17a. The district court's reliance upon the trial evidence regarding intent and self-defense is badly misplaced, however, because those issues are irrelevant to the issues raised in Wilkinson's state postconviction and federal habeas corpus petitions. Even if, arguendo, Wilkinson intended to kill his wife and was not acting in self-defense in his attempts to extricate his finger from his wife's mouth, he still may not be convicted of her murder if the actual cause of her death was unrelated to his actions. The distinction

might be illustrated thusly. A decides to kill spouse B. A discusses killing B with several acquaintances and even offers one money to kill B. Finally, A poisons B's breakfast cereal. B eats the cereal and then goes into the backyard to prune the roses. While in the yard, B is struck by lightning. B dies in the yard. A, unaware of the lightning strike, finds B's body and attempts to dispose of it. A is discovered before disposal is complete and charged with murder. Neither lightning nor the poison A used are always fatal. Despite, then, A's intent to kill and lack of self-defense, A is only guilty of B's murder — murder, that is, not attempt murder — if B's death was caused by the poison. Otherwise B's death was not criminally caused and A cannot be legally convicted of murder no matter how overwhelming the evidence of intent and lack of self-defense.

The circuit court, relying on the district court's reliance on trial evidence showing the presence of intent and the absence of self-defense, affirmed the denial of relief. Both courts ignored the habeas corpus allegations effectively challenging the occurrence of any crime at all. In other words, based solely on trial evidence infected by the ineffective assistance of counsel, the lower courts denied Wilkinson's claim of ineffective assistance. Even if, then, Wilkinson could show that his wife's death had not been criminally caused, he would still not be entitled to relief in the Northern District of Illinois and the Seventh Circuit. In that district and that circuit the intent to commit a crime is synonymous with its commission — even if there was no actual commission.

Further, the circuit court held that "an evidentiary hearing is only necessary when a more extensive factual record must be compiled to decide an issue, (citation), which was not the case here." Pet. App. 6a. Of course, the circuit court had previously acknowledged "the lack of a factual record in the state court with respect to the autopsy report," Pet. App. 4a. And in fact, absolutely nothing in the factual record before

either the district or circuit court resolved the question of the identity of the autopsy's decedent and absent proof that the autopsy's decedent was Wilkinson's wife, the only "evidence" of a criminal cause of death is Wilkinson's own assumption in an out-of-court statement that she died as the result of being choked during the fight. Pet. App. 13a. And that assumption has been shared by everyone at every level of this case. Only expert medical testimony could tell otherwise — and Wilkinson's trial lawyer, ignoring the investigative triggers of the wrong race and date of death and further ignoring Wilkinson's request to review the autopsy (and other discovery materials), never investigated the autopsy to determine the identity of its decedent and never investigated alternative causes of death inherent in the facts.

When Wilkinson himself discovered the autopsy's errors and filed a state postconviction petition setting forth those errors, the state courts — trial, appellate and supreme — sans hearing, denied relief. The federal courts also denied relief without a hearing to enable Wilkinson to prove his allegations about the autopsy, a denial that is only intelligible if those courts assumed that the autopsy's decedent was Wilkinson's wife. Those courts assumed the existence of the very fact that Wilkinson disputed and then decided, based on the existence of that assumed "fact," that Wilkinson need not be given a hearing to dispute that "fact." Nonetheless — and at the risk of being overly repetitious — if the autopsy's decedent was not Wilkinson's wife, a question of disputed fact never resolved by any court, then, contrary to the circuit court's unsupported pronouncement, Wilkinson was entitled to federal habeas corpus relief. Minimally he was entitled to an evidentiary hearing in accordance with the requirements of *Townsend*. Unless, of course, this Court were to decide that the AEDPA and the habeas corpus rules have abrogated or altered those requirements.

(B) The Circuit Court Utilized and Sanctioned the Utilization of an Erroneous Standard of Law to Determine Ineffective Assistance of Counsel

In *Strickland* at 694, this Court held that the test for prejudice when considering an ineffective assistance of counsel claim was a showing by the defendant "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." The Court specifically explained that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case." *Id.* at 693. The lower courts here, however, used a different standard. Or, more accurately, they used different standards for different claims.

The circuit court first considered whether the district court should have conducted an evidentiary hearing before denying Wilkinson's habeas petition. The circuit court held that "[t]he district court did not err in deciding that further inquiry through an evidentiary hearing was unnecessary given the facts already before it." Pet. App. 6a. The circuit court noted that

> [t]he district court concluded that Wilkinson failed to demonstrate that he suffered any prejudice as a result of his attorney's failure to investigate the autopsy report. The district court commented that because there was so much evidence of Wilkinson's guilt, he had not shown that the outcome of the trial would have been different had his attorney investigated the autopsy report.

Pet. App. 4a. That analysis, focusing as it did solely on the outcome of the state court proceeding, is defective. *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993). The standard of the lower courts here is one of certainty. It is not the *Strickland* standard of probability. To affirm the district court on the

basis of Wilkinson's failure to show the certainty of a different trial outcome is in direct conflict with this Court's precedents.

Next, the circuit court considered whether the district court correctly decided the merits of the ineffective assistance claim. This time the circuit court got the standard right: "Given [the] minor role of the autopsy report and the overwhelming amount of other evidence demonstrating his guilt, Wilkinson simply did not demonstrate a reasonable probability that had counsel objected to the autopsy report the outcome of the trial would have been different." Pet. App. 7a. The court got other things wrong — that the autopsy played a minor trial role and that counsel should have "objected" to the autopsy — but it got the standard right.

The result of the circuit court's use of two standards is that one must wonder whether the court understands that the correct standard focuses on probability rather than certainty. One must also wonder which of its interchangeable *Strickland* standards it will use evaluating ineffective assistance claims in subsequent cases. One need not wonder, though, which standard the court used to evaluate Wilkinson's *Townsend* issue, the primary issue before both that court and this Court; it was clear that the court utilized its certainty standard, the wrong standard.

The circuit court's use of the wrong standard to evaluate the denial of Wilkinson's ineffective assistance claim is in direct conflict with this Court's decision in *Strickland*. The court's interchangeable use of two standards, one erroneous and one correct, should also impel this Court's review. *Kyles v. Whitley*, 514 U.S. 419, 422 (1995). The correct understanding and application of this Court's precedents by the lower courts is indispensable to the proper administration of justice.

(C) The Circuit Court Did Not Review the District Court's Ruling De Novo

The district court's evaluation of a claim of ineffective assistance of counsel is a mixed question of law and fact and should be reviewed de novo on appeal. *Strickland* at 698. When conducting a de novo review, the circuit court must make an independent determination of the issues and is not to give any special weight or deference to the district court's decision. *United States v. First City National Bank*, 386 U.S. 361, 368 (1967); *Salve* at 238.

In the instant case, however, the circuit court did not make an independent determination of the issues because it did not review the record before the district court. Indeed, the circuit court could not review that record because it had no record to review. At oral argument, Judge Rovner informed the parties' attorneys that the record had been lost and noted that she was not sure how the circuit court could meaningfully review the district court's finding of lack of prejudice without the record. Counsel for Wilkinson submitted that the court need not review the record because the trial court issues of intent and lack of self-defense were irrelevant to the issue of whether his wife's death was criminally caused. The circuit court, however, chose not to consider the impact of the district court's failure to decide the primary question raised by the autopsy, that is, the existence of a criminal cause of death. It chose, rather, to affirm the district court based upon that court's weighing of the trial evidence against Wilkinson. To affirm on that basis, the record was indispensable. Absent the record, the circuit court could only review the district court's rulings of law and the findings of fact supporting those rulings based upon the district court's own opinion. That opinion, however, cannot be used to support its own holdings and findings. *Saltonstall v. Birtwell*, 150 U.S. 417 (1893). There was, then, no de novo review of the district court's decision.

Once again, the circuit court's action is in direct conflict with this Court's prior decisions regarding de novo review of lower court opinions. And once again, it is important to the administration of justice that this Court not allow its precedents to be disregarded by the lower federal courts.

II. This Court Should Vacate The Circuit Court's Decision Pursuant To It's Supervisory Power

Finally, the writ of certiorari should also issue because the above conflicts with the holdings of this Court — violating the *Townsend* hearing requirement, using and sanctioning the use of an erroneous standard of law to evaluate the ineffective assistance claim, and the failure to review the district court's ruling de novo — all indicate that the circuit court's decision has so far departed from the accepted and usual course of judicial proceedings and, additionally, that the circuit court sanctioned such a departure by the district court, as to call for the exercise of this Court's supervisory power to vacate the decision below. *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998); *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND FILED JULY 25, 2002

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued July 10, 2002
Decided July 25, 2002

Before

Hon. JOHN L. COFFEY, *Circuit Judge*

Hon. MICHAEL S. KANNE, *Circuit Judge*

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

No. 01-4372

MARK WILKINSON,

Petitioner-Appellant,

v.

JONATHAN R. WALLS,

Respondent-Appellee.

Appendix A

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 98 C 3430

George W. Lindberg,
Judge.

ORDER AND JUDGMENT

In 2001 the district court granted Mark Wilkinson a certificate of appealability on the following issue: whether it should have conducted an evidentiary hearing prior to deciding the merits of Wilkinson's claim of ineffective assistance of counsel. Because an evidentiary hearing was not required, we affirm.

By the spring of 1991 Wilkinson's relationship with his wife, Gilda, had deteriorated to the point where the couple had decided to divorce. During the divorce proceedings, Wilkinson became so frustrated with his estranged wife that he talked to several friends about killing her and even drew up written plans in case he ever decided to murder her. On May 26, 1991, Wilkinson returned the couple's three-year-old daughter to his wife's home, when he and Gilda began arguing violently over the terms of the divorce settlement. He testified that during the fight Gilda bit him on the finger, and he responded by choking her with his free hand. Wilkinson alleges that because she would not release his finger from her mouth, he tightened his grip on her throat until she stopped moving. Realizing that she was dead, Wilkinson went to his car to retrieve a roll of plastic and his

written murder plans. He attempted to dispose of the body, including amputating both of Gilda's legs, but became ill. He was also interrupted when his girlfriend, concerned because Wilkinson had missed a dinner date, arrived at Gilda's home. Once Wilkinson told his girlfriend he had killed Gilda, she removed Wilkinson's daughter from the home and contacted his parents. Later that same night, Wilkinson tried to commit suicide by flying a stolen airplane into a storm. He was arrested at a nearby airport the next morning.

In August 1992 a jury convicted Wilkinson of first degree murder and concealing a homicide, and he was sentenced to a total of 90 years' imprisonment, which was later reduced to 85 years. He exhausted his state court appeals, and in 1998 filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. The district court denied the § 2254 petition because it determined that all of Wilkinson's claims were procedurally defaulted. We, however, held on appeal that Wilkinson had indeed presented his attorney ineffectiveness claim to the state courts and therefore had not defaulted on that claim. As a result we remanded the case so the district court could examine the merits of his ineffective assistance claim. *See Wilkinson v. Cowan*, 231 F.3d 347 (7th Cir. 2000).

On remand the district court addressed the one issue Wilkinson had properly preserved: whether his attorney rendered ineffective assistance when he failed to investigate certain alleged "inconsistencies" in the medical examiner's autopsy report of the victim. He argued that there are so many mistakes in the report that it is questionable whether the body the medical examiner identified as Wilkinson's wife was

really her. The district court concluded that Wilkinson failed to demonstrate that he suffered any prejudice as a result of his attorney's failure to investigate the autopsy report. The district court commented that because there was so much evidence of Wilkinson's guilt, he had not shown that the outcome of the trial would have been different had his attorney investigated the autopsy report. As a result the district court denied the § 2254 petition. Two months later, however, the district court granted a certificate of appealability on the issue of whether it should have conducted an evidentiary hearing before denying Wilkinson's § 2254 petition.

AEDPA generally bars a district court from conducting an evidentiary hearing on a claim for which a petitioner has failed to develop a factual basis unless the petitioner makes a detailed showing that a new rule of constitutional law or previously undiscovered facts warrant conducting such a hearing. *See* 28 U.S.C. § 2254(e)(2). But because the lack of a factual record in the state court with respect to the autopsy report cannot be attributed to Wilkinson, § 2254(e)(2) does not apply. *See Matheney v. Anderson*, 253 F.3d 1025, 1039 (7th Cir. 2001). Therefore, we determine whether Wilkinson warranted an evidentiary hearing by assessing whether he demonstrated that 1) the facts, if proven, would entitle him to federal habeas relief and 2) the state courts—for reasons beyond his control—never considered the claim in a full and fair hearing. *See id.*

As the state argues, Wilkinson failed to present facts that if true would provide him with relief. His main factual assertion is that the medical examiner made several

"mistakes" in the autopsy report. Specifically, he claims that 1) the medical examiner misidentified the victim's race, listing the victim as "white," although his wife was Phillipino; 2) the autopsy report described the victim's gallbladder, even though Wilkinson claims that his wife had her gallbladder removed 14 months before the murder; and 3) the medical examiner described the victim's reproductive organs as "unremarkable," despite Wilkinson's claim that his wife had two caesarean sections and two abortions. Wilkinson argues that because of these "inconsistencies" in the autopsy report, the state never proved that he actually killed his wife.

To support that conclusion, Wilkinson highlights two faults with the state's case. First, he suggests that because the autopsy report was so riddled with errors, it is highly possible that the medical examiner fabricated the cause of death as strangulation. He even goes so far as to offer other medical solutions for why the victim died: she choked on a piece of flesh or went into cardiac arrest unrelated to the strangulation. Alternatively, Wilkinson suggests the state failed to meet its burden because it never proved that Wilkinson killed his *wife*, just that he killed the unknown victim on whom the autopsy was performed.

Both of these arguments miss the mark. We remanded Wilkinson's case in order for the district court to evaluate the merits of his ineffective assistance of counsel claim, which it did thoroughly. The district court examined trial counsel's performance and found that given the overwhelming evidence of his guilt, even without a challenge to the allegedly faulty autopsy report, Wilkinson failed to

show that he was prejudiced in any way by trial counsel's decision not to explore the autopsy issue. Conducting an evidentiary hearing is only necessary when a more extensive factual record must be compiled to decide an issue, *see Newell v. Hanks*, 283 F.3d 827, 838 (7th Cir. 2002), which was not the case here. The district court determined that because of the other evidence of his guilt Wilkinson would not be able to establish that he had been prejudiced by the failure to investigate the autopsy report. The district court did not err in deciding that further inquiry through an evidentiary hearing was unnecessary given the facts already before it.

Wilkinson also argues that the district court incorrectly decided the merits of his ineffective assistance claim, but the district court's certificate of appealability encompassed only whether an evidentiary hearing should have been conducted. Therefore, we construe Wilkinson's quarrel with the merits of the district court's decision as a request for a certificate of appealability on the ineffective assistance claim itself. *See Rutledge v. United States*, 230 F.3d 1041, 1047 (7th Cir. 2000). A certificate of appealability on this issue will be granted only if Wilkinson makes a substantial showing of the denial of a constitutional right such that reasonable jurists could debate whether his ineffective assistance claim should have been resolved differently. *See id.*

Applying the two-part standard announced in *Strickland v. Washington*, 466 U.S. 669 (1984), as the district court did, Wilkinson does not show that he was prejudiced by trial counsel's decision not to investigate the autopsy report. As the district court noted, the autopsy report was used only to corroborate Wilkinson's own testimony that he killed his

wife by strangling her. Given this minor role of the autopsy report and the overwhelming amount of other evidence demonstrating his guilt, Wilkinson simply did not demonstrate a reasonable probability that had counsel objected to the autopsy report the outcome of the trial would have been different. *See Bell v. Pierson*, 267 F.3d 544, 558 (7th Cir. 2001). Therefore, Wilkinson has not shown the substantial denial of a constitutional right with respect to his ineffective assistance claim, and a certificate of appealability will not now be granted on this issue.

Wilkinson also argues that the district court failed to follow the mandate of this court because it denied his ineffective assistance claim "without giving any consideration to the merits of that claim." He seems to be arguing that the district court somehow failed to consider the ineffective assistance theory (concerning the autopsy report) because the court focused on the trial evidence showing Wilkinson's intent to kill. He reasons that because the intent-to-kill evidence was discussed by the *state* appellate court and this court's mandate instructed the district court to discuss issues raised in his *federal* habeas petition, the district court disregarded the mandate. But the district court did focus on the attorney ineffectiveness claim raised in the federal § 2254 petition. Wilkinson's confusion seems to rest with the district court's conclusion that because there was no prejudice from counsel's actions, it need not evaluate whether counsel's performance was objectively unreasonable. But we have often approved this method of analyzing the prejudice prong of the two-part *Strickland* standard before assessing counsel's performance and ending the discussion once the court determines no prejudice was shown.

See Matheney, 253 F.3d at 1042; *United States v. Ruzzano*, 247 F.3d 688, 696 (7th Cir. 2001). Thus, the district court did not ignore the mandate of this court as Wilkinson suggests.

Wilkinson also contends that the district court was incorrect to focus on the intent-to-kill evidence because the "questionable" autopsy casts doubt on whether the state proved he killed the victim and that the victim was his wife. But this argument suggests that the autopsy report was the only evidence used to convict him, which is simply not accurate. The state also presented to the jury Wilkinson's own statement to his girlfriend that he had killed his wife, the written plans to kill his wife that he had drawn up months before the murder, his statements to his friends that he was going to kill her, and his attempt to conceal his crime by hiding her body and trying to kill himself. The state presented this evidence to allow the jury to infer that he had killed his wife, and none of this evidence has been challenged. Therefore, Wilkinson has not shown that trial counsel's failure to investigate the alleged mistakes in the autopsy report had any impact whatsoever on the jury's decision to convict him.

AFFIRMED.

Appendix A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: July 25, 2002

BEFORE: Hon. JOHN L. COFFEY, *Circuit Judge*

Hon. MICHAEL S. KANNE, *Circuit Judge*

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

No. 01-4372

MARK WILKINSON,

Petitioner - Appellant,

v.

JONATHAN R. WALLS, Warden of the Menard Correctional Center, Menard, Illinois,

Respondent - Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 98 C 3430, George W. Lindberg, Judge

The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on this date.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED AND FILED OCTOBER 22, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 98 C 3430

JUDGE GEORGE W. LINDBERG

UNITED STATES OF AMERICA, ex rel.
MARK WILKINSON,

Petitioner,

-vs-

ROGER D. COWAN,

Respondent.

MEMORANDUM AND ORDER

Mark Wilkinson, a prisoner in custody of the Illinois Department of Corrections, has filed a petition for habeas corpus relief. For the reasons set forth below, the petition is denied.

In 1992, petitioner was convicted of first degree murder and concealment of a homicidal death following a jury trial in the Circuit Court of Cook County, Illinois. He was

sentenced to consecutive 70 and 10-year terms of imprisonment. Petitioner challenged that conviction in the state courts of Illinois by a direct appeal and simultaneously sought post-conviction relief. Among other things, he argued that his trial counsel was ineffective for failing to investigate (or to provide him with a copy of) the medical examiner's autopsy report, which contained certain obvious discrepancies. After the circuit court summarily dismissed petitioner's petition, his appellate counsel sought leave to withdraw, asserting that his case presented no issue of arguable merit. The Illinois appellate court, upon review of the record, agreed. It granted the motion to withdraw, and summarily affirmed the circuit court's judgment dismissing the post conviction petition.

Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 raising several claims, including one of ineffective assistance of counsel. This Court determined that petitioner had procedurally defaulted the ineffectiveness claim by failing to present the claim to the Illinois appellate court. On appeal, the United States Court of Appeals for the Seventh Circuit reversed in part, holding that the ineffectiveness claim in question had not been defaulted and remanded the case to this Court to decide that claim on the merits. *Wilkinson v. Cowan*, 231 F.3d 347 (7th Cir. 2000).

Essentially, petitioner contends that his attorney should have discovered the errors in the autopsy report; alternatively, he asserts that he was familiar with his wife's medical history and would have discovered discrepancies in the report himself if only his attorney had provided him with a copy as

he requested. Had these errors been exposed at trial, petitioner argues, they would have undermined the credibility of the autopsy report, weakened the State's case for the proposition that petitioner deliberately strangled his wife, and obviated the need for petitioner to testify. Respondent, Roger D. Cowan, asserts that the conduct of petitioner's counsel was reasonable in light of other evidence, and in the alternative that any errors by petitioner's counsel did not result in prejudice to petitioner.

To prevail on a claim of ineffective assistance of counsel, a petitioner must establish: (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's unreasonable performance prejudiced petitioner, creating a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Both components of the test must be present; the lack of either is fatal to an ineffectiveness claim. *Id.* at 697. A federal court need not evaluate whether counsel's conduct failed to meet an objective standard of reasonableness, where the petitioner fails to satisfy the "prejudice" prong of the Strickland test. *Id. See also Winsett v. Washington*, 130 F.3d 269, 280 (7th Cir. 1997) ("It is often beneficial for courts to consider the prejudice prong of the *Strickland* test before delving into murkier questions of whether certain acts or decisions constituted reasonable legal advocacy."); *Cochrane v. Cooper*, 1998 U.S. Dist. LEXIS 8420 at * 15 (N.D.Ill. 1998).

The "prejudice" component of the *Strickland* test focuses on the question of whether counsel's performance renders the result of the trial unreliable or the proceeding

fundamentally unfair. *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). Prejudice under this standard refers to unprofessional errors so egregious that "the trial was rendered unfair and verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986). Therefore, in order to succeed in ineffective assistance of counsel claim, petitioner must show that but for the performance of his lawyer, the result of the trial would have been different. In looking at the trial record, there are numerous other facts that show there is no reasonable probability that the outcome of the trial would have been different had petitioner's testimony and the autopsy report not been included at trial.

Petitioner, an airline pilot, was in the process of divorcing his wife Gilda in 1991. He wrote in a letter to his parents, read into evidence during trial, that on May 26 of that year, after driving his daughter to their home in the Chicago suburb of Hoffman Estates, he and Gilda began to argue about the divorce settlement. The argument escalated and, according to petitioner:

> Gilda has attacked me on many occasions and last night was the last straw. She punched me in the right arm and clawed my right forearm in 12 places and then bit my small left finger so hard it drew blood and it was so deep some of the muscle came out and I had a difficult time moving it after that. I had enough and I slapped and I strangled her . . . She kept coming at me and I had to stop her. I couldn't take anymore, especially after she said I kept harassing her all the time, hitting her a lot, et cetera.

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The evidence at trial established that petitioner previously had talked about the possibility of killing Gilda with several of his friends. Petitioner started off joking about it, but became more and more serious as time went by. Relations with his wife rapidly deteriorated throughout the divorce proceedings. The evidence included testimony about an offer by petitioner to pay a friend $10,000 to have his wife "eliminated." Petitioner had even detailed a variety of murder scenarios on his computer. These scenarios were extremely detailed, with lists of what he needed to do, when he needed to do it, and what supplies he would need to accomplish the murder and how to escape punishment for murdering his wife.

After the fatal struggle between petitioner and his wife, petitioner realized that the circumstances surrounding Gilda's death were incriminating, and thus he consulted the print-out of murder scenarios he had carried with him in his car. He decided that he should follow one scenario where he would cremate Gilda's body and claim that she was missing. He went so far as to wrap her body in plastic (there was a roll of it in the trunk of his car) and to partially dismember the corpse so that it would fit into a fireplace. He was interrupted in this task when his girlfriend, her suspicions aroused by a telephone call by petitioner canceling their dinner date, came to the house and confronted him. Petitioner attempted to cover up the events of the evening by not allowing his girlfriend into the house for several hours. Eventually, due to his girlfriend's persistent questioning regarding his behavior that night, petitioner told her that he had killed Gilda and acknowledged that he had put his hands around her neck to do it. Petitioner's girlfriend then took the petitioner's daughter from the house and telephoned his parents. Petitioner fled from the house at that time.

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Petitioner later stole a plane from a suburban airport and flew it into a storm front, purportedly to commit suicide. However, the plane remained airborne. He then landed the plane, but took off again when he spotted a police car approaching. He flew to an airport near Kankakee, Illinois, where he spent the night and was arrested the following morning.

A central issue at petitioner's trial was whether he intended to kill Gilda, or possessed the requisite intent to otherwise be found guilty of murder. Among the evidence that the State relied upon to show that petitioner deliberately strangled her was the autopsy report, which indicated that Gilda's Adam's apple had been crushed. Petitioner alleges that he asked his attorney to provide him with a copy of the report in advance of trial so that he could review the report himself, but his attorney failed to do so. When he examined the report after the trial, petitioner discovered several discrepancies. Most importantly, the report indicated that the coroner had removed the gallbladder and sent it for toxicological examination, but petitioner contends Gilda's gallbladder had been surgically removed fourteen months prior to her death. The report also indicated that the body was free of scars, although petitioner contends Gilda had obvious scars not only from the removal of her gallbladder but also from the Caesarian section that had been performed when she gave birth to her daughter. Other discrepancies claimed by petitioner were an inaccurate time and date of death (one day later than the events described by petitioner), and an inaccurate identification of Gilda's race as White, instead of her true Filipino origin.

Appendix B

There is no reasonable probability that the outcome of the trial would have been different even assuming that the conduct of counsel was deficient in not attacking the validity of the autopsy report. Intent to kill can rarely be proved directly; Illinois permits the fact finder to infer the defendant's intent from his acts and the surrounding circumstances, including the character of the assault, the use of a deadly weapon, and other relevant circumstances. *See, e.g., People v. Buford*, 235 Ill. App. 3d 393, 405, 601 N.E.2d 1099, 1108 (1992); *People v. Agee*, 205 Ill. App. 3d 146, 151, 562 N.E.2d 545, 548 (1990). "Specific intent to kill may be shown by surrounding circumstances, including the character of the assault and the use of a deadly weapon," and "such intent may be inferred if one willfully does an act, the direct and natural tendency of which is to destroy another's life." *People v. Hill*, 276 Ill. App. 3d 683, 687, 658 N.E.2d 1294, 1297 (1995). The facts recited above show that petitioner had thought about killing his wife for quite some time. He had talked about it with friends. He had attempted to persuade one of them to "eliminate" his wife. He had prepared plans on how to murder his wife and escape punishment. His state of mind, as described by petitioner himself, shows a deliberate intent to strangle Gilda. When the fatal moment came, he carried out one of his previous plans. The autopsy report was used to only add to these facts by showing the Adam's apple was crushed through manual strangulation, which was consistent with petitioner's own story of how he killed Gilda, and was not essential to petitioner's conviction. Therefore, petitioner suffered no prejudice from his attorney's failure to attack the credibility and accuracy of the autopsy report.

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In addition, petitioner's own account of the altercation does not agree with his claim of self-defense. Self-defense requires that the petitioner must have been acting under reasonable belief that the use of force, which was intended or likely to cause death or great bodily harm, was necessary to prevent imminent death or great bodily harm to himself. *People v. Murillo*, 225 Ill.App.3d 286, 292 (1st Dist. 1992), appeal denied 596 N.E.2d 634. A mouth and teeth can create great bodily harm, and can be considered dangerous weapons, regardless of the presence or absence of AIDS. *See United States v. Moore*, 846 F.2d 1163 (8th Cir. 1988). However, in the present case, the element of reasonable belief that great bodily harm was imminent is missing. Petitioner's account depicts Gilda's act of attacking him and biting his finger as "the last straw." Petitioner then decided that he had had enough and then slapped her and strangled her. In petitioner's account, Gilda was no longer biting his finger at the time he strangled her. No reasonable jury would conclude that petitioner's act of strangulation was necessary to prevent imminent death or great bodily harm. His description of the events showed a conscious decision to strangle Gilda, with no evidence of panic, fearful thoughts about his finger, or that he was in serious danger. Petitioner's account is full of his thoughts, such as "I couldn't take anymore" and "I had enough" and "the last straw." Petitioner's description does not fit with a reasonable self-defense claim.

Therefore, petitioner has failed to show how the outcome of the trial would be unreliable, or that there is a reasonable possibility that the jury would have returned a different verdict. Thus the "prejudice" prong of an ineffective assistance of counsel claim fails, and the writ must be denied.

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ORDERED: Petitioner Mark Wilkinson's petition for writ of habeas corpus is denied. Judgment in favor of respondent, Roger D. Cowan, and against petitioner will be set forth on a separate document and entered in the civil docket. FRCP 58, 79(a).

ENTER:

s/ George W. Lindberg
GEORGE W. LINDBERG
Senior U.S. District Judge

DATED: Oct. 22, 2001

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED AUGUST 16, 2002

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 16, 2002

Before

Honorable JOHN L. COFFEY, Circuit Judge

Honorable MICHAEL S. KANNE, Circuit Judge

Honorable ILANA DIAMOND ROVNER, Circuit Judge

No. 01-4372

MARK WILKINSON,

Petitioner-Appellant,

v.

JONATHAN R. WALLS,

Respondent-Appellee.

Appendix C

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

No. 98 C 3430

George W. Lindberg, Judge.

ORDER

On consideration of the petition for rehearing filed by the petitioner-appellant on August 8, 2002, all of the judges on the original panel having voted to deny the same.

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX D — AFFIDAVIT OF DR. JOHN R. FEEGEL DATED JUNE 2, 1999

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

AFFIDAVIT

(1) My name is John R. Feegel and I am a doctor of medicine specializing in pathology and licensed to practice medicine by the State of Florida.

(2) I am certified in anatomic and forensic pathology by the American Board of Pathology.

(3) I have been Chief Medical Examiner in Tampa and Associate Chief Medical Examiner in North Carolina and Atlanta as well as Associate Professor of Pathology at the University of North Carolina and Emory University (Atlanta).

(4) I have reviewed the autopsy report on Gilda Wilkinson (561-May-1991) signed by Robert J. Stein, M.D. As well as copies of color photographs alleged to be of Gilda Wilkinson, certain laboratory reports on autopsy-obtained material, selected old surgical and postoperative pathology reports on Gilda Wilkinson, certain "crime lab" reports, and note at least the following discrepancies in the autopsy report

(a) Gilda Wilkinson was a Filipina, not a white or caucasian female

(b) Her teeth were not in poor repair as evidenced by the photograph and report of her dental hygiene

(c) The abdomen fails to list a scar from her previous caesarian section nor from her previous gall bladder removal

(d) The gall bladder is allegedly identified at autopsy yet a cholecystectomy was performed on March 3, 1990 and the gall bladder measured and described along with its gallstones by a pathologist post-operatively on May 15, 1990

(e) The uterus is described at autopsy as "not remarkable" whereas in fact at least one scar from the previous caesarian section would have been seen on careful inspection

(5) At least these errors or inconsistencies raise the reasonable inference that the Medical Examiner, Robert J. Stein, M.D., performed the autopsy on a decedent other than Gilda Wilkinson or otherwise contrived, or fabricated the autopsy in whole or in part, other than conclusions that are obvious in the post mortem photographs of the outside of the body.

FURTHER, THE AFFIANT SAYS NAUGHT

s/ John R. Feegel, M.D.
JOHN R. FEEGEL, M.D.

APPENDIX E — STATUTE INVOLVED

28 U.S.C. § 2254

§ 2254. State custody; remedies in Federal courts

* * *

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —

(1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

Appendix E

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that —

(A) the claim relies on —

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

* * * *